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IN THE

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1965

No. 526

KENNETH B. WHEELER, ..... *Petitioner*

*v.*

PAUL JONES, ..... *Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PIONEER PRESS

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas entered on the 17th day of May, 1965; rehearing denied June 7, 1965.

### CITATIONS TO OPINIONS BELOW

No opinion was filed by the Circuit Court. The opinion of the Supreme Court of Arkansas (R. 43-45), printed in Appendix B hereto, infra, p. 33 is, or will be, reported in 390 S. W. 2d 129 and 239 Ark. 455.

### JURISDICTION

The judgment of the Supreme Court of Arkansas was entered May 17, 1965. R. 46; p. 35, infra. Rehearing was denied on June 7, 1965. R. 58. The jurisdiction of this

Court is invoked under 28 U. S. C. Sec. 1257 (3). The substantial Federal questions sought to be reviewed here were first raised in the trial court by oral argument, upon issues raised by respondent's Demurrer, and again in the trial court by Letter-Motion to reconsider said court's ruling sustaining the Demurrer. R. 34, 35. They were again raised in the Supreme Court as points relied upon for reversal. The precise manner of raising said questions is set forth in the "Statement" below in accordance with Rule 23 (1) (f). The Supreme Court of Arkansas passed upon said questions in its opinion. R. 45. Said questions were again raised in Petitioner's "Motion for Rehearing." R. 51-56.

## Questions Presented

Whether, in a general election contest, a judicially founded procedural rule which requires petitioner to allege and swear to the truth of facts which he cannot possibly know violates the Fourteenth Amendment to the Constitution of the United States; and

Whether, assuming such a procedural rule is proper, it may constitutionally be applied against petitioner retroactively, where there is no prior notice of the existence of such rule in general election contest proceedings; and

Whether the lower court's refusal to permit petitioner to amend his complaint for the purpose of inserting such new, judicially required, non-factual allegations is a denial of due process of law under the 14th amendment to the Constitution of the United States of America.

## Statutes Involved

The challenged rule is, according to the Supreme Court's opinion, "not of statutory origin." R. 44. The statutory, general election, contest provisions pursuant to which this proceeding was originally filed are part of Chapter 12, Section 3-1201 et seq., particularly Sec. 3-1204, Ark. Stats. 1947 Ann. They are printed in Appendix A, infra, p. 21. The general statutory pleading requirements, set forth in Sec. 27-1113, 27-1150, 27-1117, 27-1158

and 27-1160, Ark. Stats. 1947 Ann., are also printed in Appendix A, infra, pp. 31-32. Also printed in Appendix A are the Arkansas Statutes which set up the general election machinery and the Arkansas Statutes controlling the contest of primary elections.

## STATEMENT

Petitioner was the Republican Candidate for County Judge of Searcy County, Arkansas, in the General Election held November 3, 1964. Respondent was the Democratic candidate. After the election, the County Board of Election Commissioners certified the vote to be 1701 for Respondent to 1691 for Petitioner and further certified Respondent to be the duly elected County Judge. On November 21, 1964, Petitioner filed an election contest pursuant to Title 3, Chapter 12, Sections 3-1201 et seq. See Appendix A for statutory basis. The Complaint (R. 5-16; R. 22-31) alleged that 52 named persons, who were not qualified electors, voted in the absentee box, and that an additional 196 persons voted in precincts in which they did not reside. The votes of two voters were challenged on the ground that they voted twice. Other challenges were made. If the allegations had been proved, over 200 ballots would have been voided, regardless of the candidate for whom they were cast. A demurrer was filed by respondent. At the argument on the demurrer the court orally indicated that it felt the demurrer should be sustained on the ground that it did not state a cause of action because (a) there was no explicit allegation that the petitioner would win if the contest were allowed and (b) there was no specific allegation of the exact numerical vote which would result from the contest. The trial court further refused to grant leave to amend the complaint because, if allowed, the complaint, in its opinion, would then assert a new cause of action, barred by limitations. Petitioner, while arguing that there were no such pleading conditions required by the general election contest statutes, contended, nevertheless, (during the oral argument) that such conditions would be unconstitutional under the Federal and State constitutions if they were in fact required. On De-

cember 10, 1964, the lower court signed an order sustaining the demurrer, which order was filed of record December 14, 1964. No opinion was filed and no reasons given in the order itself. By letter-motion of January 4, 1965 (R. 34-35) Petitioner requested the lower court to reconsider its ruling, at which time the constitutional issues were again raised. The lower court would not reconsider its ruling. A Notice of Appeal was duly filed.

The points relied upon by petitioner in the Arkansas Supreme Court are set forth on pages 3-6 of the Abstract and Brief which he filed in said Court (nine copies of which are being filed herewith pursuant to Rule 21 (4) of this Court's Revised Rules). Said statement of points shows precisely how the Constitutional questions were raised in the Arkansas Supreme Court.

In his brief in the Supreme Court of Arkansas Petitioner also stated:

> "A method of contesting elections is an essential part of the whole democratic election process. It is almost meaningless to have the right to register or the right to vote if, additionally, there is not the right to ascertain that the declared results of the election represent the true results. So the State of Arkansas has wisely provided, both in its constitution and in its statutory law, a basis which, taking language at its face value, is fair and reasonable. However, if by statutory construction or judicial fiat a rule is established which effectively closes the courthouse door to those seeking to establish the truth about an election, then constitutional issues immediately arise, both state and federal.
>
> * * *
>
> The 14th Amendment of the Constitution of the United States of America, and through it, parts of the Bill of Rights, the 9th Amendment of the United States Constitution and Sections 3, 4, 8, 12, 13, 18, 24 or 29 could possibly be brought into issue depending upon the precise position which the court might take upon

the issues here before it. Principally, however, the due process clauses of the Federal Constitution—the 14th Amendment to the United States Constitution and Art. 2, Section 8 of the Arkansas Constitution—and Section 13 of Art. 2 of the Arkansas Constitution appear to be involved here. The latter states:

'Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely and without denial, promptly and without delay, conformably to the laws.'

Broadly stated, the point is that remedies should be available, and that citizens should have a reasonable and fair method of exercising these remedies. Statutes or judicial decisions which unduly and unfairly restrict the right to obtain a hearing upon the merits before a competent tribunal would violate the constitutional provisions just referred to. The effect of such restrictions is to deny to the citizen a 'hearing'—the fundamental element of due process.

In evaluating these contentions here it should be kept in mind that we are in the critical area of voting rights. See *Gray* v. *Sanders,* 372 U. S. 371, 83 S. Ct. 801 (1963). In an election contest the rights of others, not parties to the proceedings, are still obviously involved.

As stated by Justice Brandeis in *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U. S. 673, 50 S. Ct. 451, 454 (1930):

'If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious, *Ettor* v. *Tacoma,* 228 U. S. 148, 33 S. Ct. 428, 57 L. Ed. 773. The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid (*First National Bank of Greeley* v.

*Weld County,* 264 U. S. 450, 44 S. Ct. 385, 68 L. Ed. 784) state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.

• • •

'We are not now concerned with the rights of the plaintiff on the merits . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support.

• • •

'But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law.'

The same idea is set forth by Mr. Justice Harlan in *Societe Internationale* v. *Rogers,* 357 U. S. 197, 78 S. Ct. 1087, 1094 (1958):

'These decisions establish that there are constitutional limitations upon the powers of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'

As argued above, it would be necessary for the contestant here to violate the laws of the State of Arkansas in order to find out how those persons voted who cast the illegal ballots enumerated in his complaint. In a way this principle was involved in the *Rogers* case just cited. A person should not be penalized for failing to make an investigation which he has no power to make or for failing to violate the election laws of the State of Arkansas for the purpose of determining—and then alleging—how people voted in an election (pp. 39-44, Abstract and Brief).

And, finally, petitioner argued:

> "The refusal to permit contestant to amend his complaint would, under the facts of this case, raise the same constitutional issues as those referred to in Arguments B (3), B (4), C (2) and C (3) above. Those arguments are adopted herein by reference and the court is asked to consider same in connection with this point" (Pages 52-53 of Abstract and Brief).

On May 17, 1965, the court handed down its opinion (R. 43-45) in which it stated:

> "There is no allegation either that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside" (R. 43).

The Supreme Court stated that the rule with respect to such allegations, "is not of statutory origin" (R. 44). The opinion went on:

> "It is merely an example of the basic principle that a complaint, to be good against demurrer, must state *facts* constituting a cause of action. It is the absence of such facts that makes the present complaint fatally defective" (Emphasis by the Court) (R. 44).

With respect to the constitutional issues the court stated:

> "Secondly, it is insisted that this plaintiff would be denied due process of law if we should hold his complaint to be subject to demurrer. This argument has no merit. Fundamentally the appellant complains of the fact that some persons voted in precincts where they did not live and that others who were not qualified electors were allowed to vote. There is nothing in the due process clause to require either that a voter cast his ballot only in his home precinct or that he comply with the various Arkansas statutes defining a qualified elector. As far as the constitution is concerned, the legislature is free to dispense with both of these requirements. Thus it is readily apparent that the grievances now asserted by the plaintiff do

not involve matters protected by the guaranty of due process of law.

> "The trial court was right in refusing to allow the plaintiff to amend his complaint after the expiration of the twenty days allowed for the filing of the contest. Ark. Stat. Ann. § 3-1203. As we have seen, this complaint did not state a cause of action. To allow it to be amended in such a way as to state a cause of action would, in effect, permit the plaintiff to assert, for the first time, his cause of action after the expiration of the twenty days. Such an amendment is not permissible" (R. 45).

Petitioner filed a Motion for Rehearing (R. 47-57), pertinent parts of which will be found therein under Points II, III, IV and CONCLUSION (R. 51-57), which show the manner in which the substantial federal questions were last raised in the Supreme Court of Arkansas.

## Reasons for Granting the Writ

The decision below impinges upon basic voting and political rights. It should be examined in the context of the Arkansas statutes controlling the conduct of general elections, since the county judge race here can be considered part of an overall effort to establish a two party political system in the State of Arkansas. Under the Arkansas statutes the majority, administration forces are given effective control of all of the election machinery. Those statutes will be found set forth as Section III of Appendix A, infra.

The State Board of Election Commissioners is composed of the governor, lieutenant governor, the attorney general, the secretary of state, the state auditor, the state treasurer, the commissioner of state lands, and the state chairmen of the central committees of the majority and minority parties. Section 3-607, Ark. Stats. 1947 Ann. The majority party is defined as the party polling the greatest number of votes for the office of governor in the preceding general election and the minority party is that political party receiving the second greatest number of votes in

that election. Sec. 3-606, Ark. Stats. 1947 Ann. By law the county chairmen of the County Central Committees of the majority and minority parties constitute two members of the three-man County Board of Election Commissioners. The third member of each county board is appointed by the State Board of Election Commissioners. Sec. 3-607. At each voting precinct there are three judges and two clerks. Sec. 3-608 Ark. Stats. 1947 Ann. provides for their selection as follows:

> "County commissioners to select election judges and clerks-Manner-Names of appointees posted-vacancies. It shall be the duty of the County Board of Election Commissioners, not less than five (5) days preceding a general election to select and appoint three (3) judges and two (2) clerks for each voting precinct in their respective counties and to preform the other duties prescribed, provided however, that two (2) judges and one (1) clerk in each precinct shall be chosen and appointed by two (2) members of the County Board of Election Commissioners representing the majority party and one (1) judge and one (1) clerk at each precinct shall be chosen and appointed by the members of the County Board of Election Commissioners representing the minority party. Provided further, that if there are no registered or known members of the minority party in any precinct or precincts within a county the minority party member of the County Board of Election Commissioners is hereby prohibited from naming any person to represent such minority party as a judge or clerk in any such precinct or precincts who is a member of the majority party, and in such event, the County Board of Election Commissioners shall by a majority vote name the judge and the clerk allotted the minority party for any such precinct or precincts. The County Board of Election Commissioners shall immediately upon performing such duties prepare, publish and post in a public place in the Sheriff's office and in the County Clerk's office of each County their respective list of appointees as judges and clerks of elections.

> In the event the majority or minority representatives on such County Boards of Election Commissioners do not select and appoint their full quota of judges and clerks for each voting precinct, as authorized hereinbefore then the County Board of Election Commissioners by majority vote may fill such vacancy, provided, that in no event shall all of the judges or both of the clerks at any voting precinct be members of the same political party unless there are no members of the minority party registered in said precinct."

The County Board of Election Commissioners not only appoints the judges and the clerks but also establishes the precinct boundaries and the places where the elections are held. Sec. 3-801. It is charged with ascertaining and declaring the result of the elections. Sec. 3-1011. It can determine whether to grant a recount and, if so, conduct that recount. Section 3-1012. So it is clear that the administrative handling of general elections in Arkansas is completely within the control of the majority, administration forces. The relief then for an unsuccessful minority candidate is for practical purposes limited to that provided by the election contest statutes. Those provisions are found as part of Title 3, Chapter 12, Sections 3-1201 through 3-1223, Ark. Stats. 1947 Ann. See Appendix A.

Petitioner filed his twelve-page election contest complaint in the Circuit Court of Searcy County within the 20-day period after the general election provided by Sec. 3-1203. Sec. 3-1204 specifies the procedure:

> "3-1204. COMPLAINT-CONTENTS-ISSUES-JUDGMENT OF OUSTER AND FOR DAMAGES-APPEAL.—All actions or proceedings for contests as herein mentioned shall be by complaint filed in the circuit court as other actions at law, in which the contestant shall plainly and fully set forth the grounds upon which the contest is found, and upon the trial of the same, he shall be confined to such grounds as are therein mentioned, but may amend the same in such manner and upon such terms as do not prejudice his opponent. If the contestant shall succeed in his action, he shall not only have a judg-

ment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit; Provided, That either party shall have the right to appeal, with or without supersedeas, as in other cases at law."

It should be noted that there is no statutory requirement that the complaint contain an allegation that the contestant will win the contest or any specific allegation as to how the challenged votes were in fact cast. This requirement, however, has apparently now been established by the Supreme Court of Arkansas in this proceeding. The complaint here was found to be defective because, in the language of the Supreme Court of Arkansas:

> "There is no allegation either that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside" (R. 43).

There is no way to know, prior to an election contest, how illegal and void ballots were in fact cast. In fact, in a proper contest there is no need to invade the secrecy of the ballot to determine how a particular illegal ballot was cast. If the person casting the ballot was not a qualified elector or if he did not vote within his precinct as required by law then the defective ballot can simply be removed and the remaining valid ballots counted to determine the results of the election. The alternative is to examine the illegal ballot, find out for whom it was cast, and subtract it from that candidate's total. Even under this procedure (which violates the secrecy of the ballot) one cannot determine how the ballot was cast until the contest proceedings are actually held. Therefore, unless one illegally gets possession of the ballots and examines the illegal ones, he cannot possibly know, at the time he files his election contest, for whom they were cast. If it is impossible for one to know how the illegal ballots were cast, is it within the court's power to require him to allege that such ballots were cast for his opponent? If a contestant cannot possibly know whether he will have a majority of the ballots, after the illegal votes are discarded, is it within the power of the

courts of Arkansas to require him to allege under oath (by verified complaint) that he will in fact win the contest?

The Supreme Court stated that these pleading rules were "not of statutory origin" (R. 44), but rather, "merely an example of the basic principle that a complaint, to be good against demurrer, must state *facts* constituting a cause of action" (R. 44). But it is apparent that all of the *factual* allegations necessary to frame the issues in the election contest were contained in the Complaint. And we have seen that no one could, in good faith, allege what the facts were with respect to the individual ballots or what the ultimate result would be. All that could be alleged was petitioner's "hope", "belief" or "guess" in this connection. Petitioner "plainly and fully set forth the grounds upon which the contest is founded" as required by Section 3-1204; an allegation as to his belief or hope would add nothing to the factual allegations.

It will be noted that the Arkansas Supreme Court is here establishing a purely formal pleading requirement. It is in fact asking for explicit, rote allegations that the illegal ballots were cast for petitioner, and that he would win the election contest. We say this because there is the clear implication in the Complaint that he believed that sufficient of the illegal ballots were cast for his opponent in order for him to win the contest. This argument was made in the Arkansas Supreme Court under Point I(B)(2):

> "If there is such a requirement, contestant adequately and substantially complied therewith."

The Supreme Court did not comment upon this argument. As stated, the inferences that petitioner believed that the election ballots were cast for his opponent and that he believed that he would win, can not be avoided by a fair reading of the Complaint. This being so, it is clear that these new pleading requirements are of a purely formal nature.

The decision of the Arkansas Supreme Court here is a new application and extension of the reasoning in a line of cases of that Court, interpreting the statutory contest provisions for ***primary*** elections, which statutory pro-

visions are entirely separate, and different from those controlling *general* election contests. The former are found in Chapter 2 of Title 3 of the Arkansas Statutes. See Appendix A. Even under those decisions, the Complaint here would have been held good upon demurrer. Only one of these cases, that of *McClendon* v. *McKeown*, 230 Ark. 521, 323 S. W. 2d 542, (1959), is cited by the Court below. In the *McClendon* case, the Complaint failed to contain an allegation "showing the number of votes received by each candidate". The contestant's offer, therefore, to challenge 23 unnamed and unidentified votes was meaningless. There was no way, by examining the Complaint, to tell if a successful challenge of 23 votes—or any other number of votes —would or could change the results of the election.

Petitioner Wheeler's Complaint here showed the number of votes returned for Mr. Jones and the number of votes returned for him (Wheeler). Furthermore, a fair reading of the *McClendon* case makes it absolutely clear that the determining factor there was contestant's failure to give the names of the persons "alleged to have cast an illegal ballot". The Supreme Court said there:

> "His continuing *failure to name the persons casting the alleged illegal ballots* justified the Circuit Court in sustaining the demurrer. . . ." (emphasis added)

As stated earlier in the *McClendon* opinion:

> "In *Ferguson* v. *Montgomery* (supra), and in *Crawford* v. *Harmon* (supra), we pointed out that *when challenged ballots were to be discarded*—as distinguished from fraud involving the entire box—*it was essential that the names of the challenged voters should be given.* In sustaining a demurrer to a paragraph in a complaint we said, in *Crawford* v. *Harmon* (supra) [149 Ark. 323, 232 S. W. 428]: 'The paragraph contained no allegations *with respect to the names* of any of the persons who are alleged to have cast the unsigned ballots.'" (Emphasis added.)

Petitioner's Complaint below, however, identified each illegal ballot by voter name, voter number, and the bases of illegality. The *McClendon* opinion starts out with a

review of the pleading requirements under the primary contest statute as follows:

> "(1) given the name of each person alleged to have cast an illegal ballot and the township in which each had voted; (2) stated the name of each person whom it was alleged had voted without poll tax; and (3) listed the name of each of the other voters casting ballots claimed to be illegal. There were several hundred so claimed; . . . Thus it will be seen that in *Gunter* v. *Fletcher* the contestant gave detailed information of the name and voting place of each person alleged to have cast an illegal ballot."

An examination of petitioner's Complaint will show that it set forth "(1) . . . the name of each person alleged to have cast an illegal ballot and the township in which each voted; (2) stated the name of each person whom it was alleged had voted without poll tax; and (3) listed the name of each of the other voters casting ballots claimed to be illegal."

The basis of the Arkansas Supreme Court's decision here is discussed above to show that there was no prior notice to petitioner of any such pleading requirements as those here established by the Arkansas Supreme Court, and retroactively applied. There are no Arkansas cases interpreting the *general election* contest statute which even hint at such pleading requirements, and the cases arising under the primary election contest statutes, which are sui generis, and which, as stated by the Arkansas Supreme Court in *Robinson* v. *Knowlton,* 183 Ark. 1127, 40 S. W. 2d 450 (1931) are:

> ". . . generally held not to be a civil action subject to the rules of pleading in actions at law but to be *special statutory proceedings,* varying in its nature as well as *in the sufficiency of the pleadings* according to the statutes . . ." (Emphasis added.)

never went so far as to establish such requirements as those found by the Court below. In fact, while the primary election contest statutes are, as indicated, interpreted on the basis of their special language, the *general election* contest statute specifically provides that the proceedings shall be

"by complaint filed in the Circuit Court *as other actions at law.*" Section 3-1204. This would make it clear that the general election contest complaint should be evaluated as complaints filed in "other actions at law," and, in this respect, the general pleading requirements in Arkansas in civil actions are most liberal. Section 27-1113 provides:

> "Complaint—Form and contents—The first pleading by the plaintiff is the complaint. The complaint must contain:
>
> First. The style of the court in which the action is brought.
>
> Second. The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words 'complaint at law', if the proceedings are at law, and by the words 'complaint in equity', if the proceedings are equitable.
>
> *Third. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action.*
>
> Fourth. A demand of the relief to which the plaintiff considers himself entitled. [Civil Code, § 109; C. & M. Dig., § 1187; Pope's Dig., § 1409.] (Emphasis supplied.)"

And Section 27-1150 provides:

> "In construing a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties."

All of the facts necessary to raise the issues to be tried by the Court are set forth in petitioner's Complaint. It is clear that, if the Complaint is to be evaluated under general principles and procedure, "as other actions at law," then, its twelve pages, when "construed with a view to substantial justice between the parties", set forth "in ordinary and concise language . . . all of the facts constituting plaintiff's cause of action."

The Court's decision below is arbitrary and grossly unfair and has the effect of denying petitioner, and others, basic political rights. The right to vote becomes an empty thing if there is no fair and reasonable procedure for obtaining a hearing for the purpose of establishing the truth as to the outcome of elections. The state of Arkansas, through its legislature, provided a statutory method for contesting the results of general election races which, on its face, is fair and reasonable. The Arkansas Supreme Court, however, has judicially added new requirements not found in the contest statutes, and, in fact, not heretofore established by judicial decision, which effectively closes the court house door to honest contestants, since they require him to explicitly allege, and verify under oath, factual information which he could not know unless he in fact violated the laws of the state of Arkansas. If he knows how the illegal ballots were cast, at the time he files his Complaint, then he has clearly in some manner violated the law. If he does not know, he should not be required to make a frivolous allegation of his belief in that respect.

Petitioner wishes to make the extent of his argument clear. If the certified returns had shown him losing the election by over 300 votes, say, then his Complaint, challenging less than that number, should *not* be good against demurrer, because he could not win the contest even if all of the challenged ballots were discarded. But here, according to the certified official returns, petitioner lost the election by 10 votes. He has challenged over 200 ballots as being illegal and void. Those ballots may have been cast for him; they may have been cast for Mr. Jones. Petitioner has no way of knowing. Still, he has certainly challenged sufficient votes to alter the outcome of the election. He should not be required to make irrelevant, non-factual allegations as to his opinion as to the outcome of the litigation, and, in doing so, to play fast and loose with his oath.

Not only are these new judicial pleading requirements arbitrary, unfair and unreasonable; not only did petitioner have no fair and reasonable notice of such requirements; but in addition, petitioner was denied the right in the Court below to amend his Complaint to insert these purely formal allegations. The Supreme Court said:

> "The trial court was right in refusing to allow the plaintiff to amend his complaint after the expiration of the twenty days allowed for the filing of the contest. Ark. Stat. Ann. § 3-1203. As we have seen, this complaint did not state a cause of action. To allow it to be amended in such a way as to state a cause of action would, in effect, permit the plaintiff to assert, for the first time, his cause of action after the expiration of the twenty days. Such an amendment is not permissible."

It will be recalled that the statute, under which the contest was filed, provided, inter alia, "but (contestant) may amend the same (the complaint) in such manner and upon such terms as do not prejudice his opponent." Section 3-1204. Furthermore, under general pleading requirements in Arkansas the right to amend is liberally granted. Section 27-1117 provides:

> "If the Court sustains the demurrer, the plaintiff may amend, with or without costs as the Court may order."

Such amendments are permitted as a matter of course. See *Dickerson* v. *Hamby*, 96 Ark. 163, 131 S. W. 674. Sections 27-1158 and 27-1160 also show the liberal position of the Arkansas law, generally, upon the question of amendments to pleadings. The effect of these provisions, however, is avoided by the Supreme Court's decision that petitioner failed to "state a cause of action" in his complaint and ergo, the reasoning goes, to permit him to amend same to state a cause of action would not be possible after the expiration of the 20-day statute of limitations. But this is purely specious, circular reasoning. By using the magic words, "this complaint did not state a cause of action," denial of the right to amend would appear to naturally follow. But an analysis of the Complaint will show that every allegation necessary to raise each and every factual issue to be tried is there in black and white. How can one's allegation of his beliefs or hopes or opinions be considered part of his "cause of action" in a general election contest?

Even under the restrictive cases interpreting the *primary* election statute, the Supreme Court has stated in

*Robinson* v. *Knowlton*, 183 Ark. 1127, 40 S. W. 2d 450 (1931):

> "This court has said that the statute providing for contesting elections should be liberally construed. The purpose of the contest is to determine what candidate received the greatest number of votes.
>
> [4, 5] The pleadings, in an election contest case, should be sufficiently specific to give reasonable information as to the grounds of contest. The statute provides that the contest shall be begun in a certain number of days, and this court has held that after the time for filing a contest has expired, the contestant cannot so amend his complaint or petition as to set forth any new cause of action. He can, however, even after the time has expired, amend his complaint by making it more definite and certain as to any charge in his original complaint, and, if a motion to make it more specific is filed, it would be his duty to make the amendment."

When one couples the statutory scheme for conduct of general election contests with the lower court's ruling upon the "right to amend," it is clear that the court has done away with such right. The 20-day statute of limitations found in Section 3-1203 should be read in the light of the fact that the contestee has 20 days within which to file a responsive pleading. Therefore, even if the contestant files his contest on the day after the general election, by the time contestee is required to file his demurrer, or answer, 20 days later, the so-called "right to amend" deadline would also have expired under the reasoning of the court here.

The requirements of due process vary with the type of proceeding involved. *Hannah* v. *Larche*, 363 U.S. 420, 80 S. Ct. 1502 (1960). Since election contest proceedings represent the last opportunity to vindicate the results of the democratic process, arbitrary and unfair procedural roadblocks which have the effect of denying contestants their day in court and indirectly depriving the electorate of an opportunity to establish the truth as to the outcome of particular elections should certainly be scrutinized carefully to determine if they meet the rudimentary standards of fair play traditionally associated with the judicial

process. The requirements which the Supreme Court of Arkansas has here established for the first time with respect to general election contests are anomalous when viewed in the light of the general pleading requirements in other types of actions in Arkansas even though the Supreme Court has here suggested that it was simply applying the usual pleading requirements. The fact of the matter is that in no other area has the court required a plaintiff to allege facts which he cannot possibly know as an essential part of stating a cause of action.

The fact that these restrictive, arbitrary, and impossible conditions have been established by the judiciary in the course of construing an otherwise valid state statute does not insulate such requirements from the necessity of meeting the requirements of due process.

See *Brinkerhoff-Farris Trust and Savings Co.* v. *Hill,* 281 U.S. 673, 50 S. Ct. 451, 454 (1930) quoted on page 5 of this petition, supra.

Impossible conditions, and those which would require an investigation by the plaintiff which is beyond his power to make, or which would require a plaintiff to violate state criminal laws, certainly should not be tolerated. The power of the state in this respect, as exercised by the Supreme Court here, is limited. See *Societe Internationale* v. *Rogers,* 357 U. S. 197, 78 S. Ct. 1087, 1094 (1958) quoted at page 6 of this petition, supra.

The importance of the questions presented is great. Historically there have been very few *general* election contests in the southern states of this nation because the only real political fights were in the Democratic Primaries. Before a two party or multi-party system can evolve, general election procedures must be established which give the minority party fair opportunity to see that its votes are counted and recorded. If one examines the election machinery established by statutes in Arkansas he will quickly see that much needs to be done before we can be said to have a fair system of administering elections. Regardless of improvements that may be made in this area, however, ultimately the only method of determining the true outcome of

an election is through the utilization of the contest provisions of our state statutes. If the courts are permitted to put impossible conditions on this remedy then all other reforms will tend to be meaningless. So, although the issues here presented are narrow ones, their importance to the democratic process cannot be over-emphasized.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. Thomas Eisele
*Counselor for petitioner*

# APPENDIX A

## I.

Article 19, Section 24, Constitution of the State of Arkansas (1874):

Election contests.—The General Assembly shall provide by law the mode of contesting elections in cases not specifically provided for in this Constitution.

## II.

Arkansas Statutes controlling General Election Contests (Chapter 12, Title 3):

A. Section 3-1201: Judicial offices and commissioner of state lands—Venue of contests.—If the election of any Supreme Judge or Commissioner of State Lands be contested, it shall be before the circuit court of Pulaski County. chancellor, clerk of the Pulaski Chancery Court, a judge of If (the election of) any circuit judge, prosecuting attorney, the county (and probate) court, be contested, it shall be before the circuit court of the county where the defendant or contestee resides, or the county where the contestant resides and the contestee may be found. (Act Jan. 23, 1875, No. 34, & 67 (1st, 2nd sentence), p. 92; C. & M. Dig., 3846; Pope's Dig., 4833.)

B. Section 3-1203: Limitation of actions to contest county, city or township office.—All actions to contest the election of a person to any county, city or township office shall be commenced within twenty (20) days after the General Election at which any such person was elected. (Acts 1947, No. 406 § 1, p. 1002.)

C. Section 3-1204: Complaint—Contents—Issues—Judgment of ouster and for damages—Appeal.—All actions or proceedings for contests as herein mentioned shall be by complaint filed in the circuit court as other actions at law, in which the contestant shall plainly and fully set forth the grounds upon which the contest is found, and upon the trial of the same, he shall be confined to such grounds as are therein mentioned, but may amend the same in such

manner and upon such terms as do not prejudice his opponent. If the contestant shall succeed in his action, he shall not only have a judgment of ouster, but for damages, not exceeding the salary and fees of the office during the time he was excluded therefrom, with costs of suit; Provided, That either party shall have the right to appeal, with or without supersedeas, as in other cases at law. (Act Jan. 23, 1875, No. 34, § 68, p. 92; C. & M. Dig., §§ 3848, 3849; Pope's Dig., §§ 4835, 4836.)

D. Section 3-1205: County offices—Jurisdiction—Notice of contest.—When the election of any clerk of the circuit court, sheriff, collector, coroner, county surveyor, county treasurer, county tax assessor, justice of the peace, constable or any other county or township officer, the contest of which is not otherwise provided for, shall be contested, it shall be by a complaint filed before the Circuit Court as in other actions at law, and notice to the opposite party shall be given by serving a summons upon him, to which shall be attached a copy of the complaint specifying the grounds on which the contestant intends to rely and, if any objections be made to the qualifications of voters, the names of such voters with the objections thereto. (Act Jan. 23, 1875, No. 34, § 71, p. 92; C. & M., § 3850; Pope's Dig., § 4837; Acts 1963, No. 535, § 1, p. 1646.)

E. Section 3-1207: Order of court—Commission to successful contestant.—If the court shall be of the opinion that the person proclaimed elected is not duly elected and the person contesting is elected, an order shall be entered to that effect, and a certified copy thereof shall forthwith be transmitted by the Clerk of the Court to the Governor, who shall commission that person declared duly elected by such order. (Act Jan. 23, 1875, No. 34, § 73, p. 92; C. & M. Dig., § 3852; Pope's Dig., § 4839; Acts 1963, No. 535, § 2, p. 1646.)

F. Section 3-1208: Revocation of previous commission.—If the person proclaimed duly elected shall have been commissioned previous to making the order annulling his election, it shall be the duty of the Governor to cause such person to be notified that his commission is revoked. (Act Jan. 23, 1875, No. 34, § 74, p. 92; C. & M. Dig., § 3853; Pope's Dig., § 4840.)

G. Section 3-1210: Contestants to give bond.—In all suits brought in any of the circuit courts, or in any of the county courts in this State, to contest the election of any State, district, circuit, county or township officer, the contestant shall be required to enter into a bond with good and sufficient security, to be approved by the clerk of the court in which such suit shall be brought, conditioned that the contestant and his securities will pay to the contestee or defendant in the action, and the officers of court, such sum of money as shall be adjudged against him in the court in which the suit shall be brought or in any other court to which it shall be carried by appeal or otherwise. (Act Feb. 24, 1879, No. 15, § 1, p. 12; C. & M. Dig., § 3855; Pope's Dig., § 4842.)

III.

Arkansas Statutes establishing general election machinery:

A. Section 3-606: Majority and minority parties defined.—For the purpose of this Act (§§ 3-606 - 3-611), the majority party shall be construed to be that political party polling, in the State of Arkansas, the greatest number of votes for Governor in the last preceding general election and the minority party shall be construed to be that political party polling, in the State of Arkansas, the second greatest number of votes for Governor in the last preceding General Election. (Init. Measure of 1948, No. 3, § 1, Acts 1949, p. 1417.)

B. Section 3-607: State board of election commissioners—Chairman and secretary—County board of election commissioners—Vacancies or disqualifications.—Hereafter the State Board of Election Commissioners as provided for in Initiated Act No. 3 (§§ 3-606 - 3-611) adopted by the people at the General Election in 1948 shall be comprised of the Governor, Lieutenant Governor, the Attorney General, the Secretary of State, State Auditor, State Treasurer, Commissioner of State Lands, the State Chairman of the State Central Committee of the majority party and the State Chairman of the State Central Committee of the minority party. The Governor shall act as ex-officio Chair-

man of such Board and the Secretary of State shall act as ex-officio Secretary of such Board and shall keep the records of said Board.

The County Chairman of the County Central Committee of the majority party and the County Chairman of the County Central Committee of the minority party shall be members of the County Board of Election Commissioners and together with one (1) additional or third member to be appointed by the State Board of Election Commissioners, shall constitute the entire membership of the County Board of Election Commissioners for each of the several Counties in Arkansas. The third member of each County Board of Election Commissioners shall be appointed by the State Board of Election Commissioners at least ninety (90) days before any General Election for State, District or County office.

In the event of a vacancy or disqualification on the part of any State or County Chairman for either the majority or minority parties, then and in that event, the State Vice-Chairman or County Vice-Chairman of the party in which such vacancy occurs shall act as County Chairman or State Chairman as the case may be for all of the purposes set out in this Act (§§ 3-606 - 3-611) until a new County Chairman or State Chairman is selected by such parties. [Init. Measure of 1948, No. 3, § 2, Acts 1949, p. 1417; Acts 1951, No. 74, § 1, p. 151.]

C. Section 3-608: County commissioners to select election judges and clerks.—Manner—Names of appointees posted—Vacancies.—It shall be the duty of the County Board of Election Commissioners, not less than five (5) days preceding a general election to select and appoint three (3) judges and two (2) clerks for each voting precinct in their respective Counties and to perform the other duties prescribed, provided however, that two (2) judges and one (1) clerk in each precinct shall be chosen and appointed by two (2) members of the County Board of Election Commissioners representing the majority party and one (1) judge and one (1) clerk at each precinct shall be chosen and appointed by the members of the County Board of Election Commissioners representing the minority party. Provided

further, that if there are no registered or known members of the minority party in any precinct or precincts within a county the minority party member of the County Board of Election Commissioners is hereby prohibited from naming any person to represent such minority party as a judge or clerk in any such precinct or precincts who is a member of the majority party, and in such event, the County Board of Election Commissioners shall by a majority vote name the judge and the clerk allotted the minority party for any such precinct or precincts. The County Board of Election Commissioners shall immediately upon performing such duties prepare, publish and post in a public place in the Sheriff's office and in the County Clerk's office of each County their respective list of appointees as judges and clerks of elections.

In the event the majority or minority representatives on such County Boards of Election Commissioners do not select and appoint their full quota of judges and clerks for each voting precinct, as authorized hereinbefore then the County Board of Election Commissioners by majority vote may fill such vacancy, provided, that in no event shall all of the judges or both of the clerks at any voting precinct be members of the same political party unless there are no members of the minority party registered in said precinct. [Init. Measure of 1948, No. 3, § 3, Acts 1949, p. 1417; 1963, No. 477, § 1, p. 1513.]

D. Section 3-801: Precinct boundaries—Alteration and establishment—Voting places.—The County Election Commissioners are hereby empowered to alter the boundaries of existing election precincts and to establish new ones when, in their judgment, it may be necessary, and to fix a place in each election precinct where the election shall be held; and in changing the boundaries of existing precincts, or in creating new ones, the said commissioners shall so arrange the same that all qualified voters residing therein may vote on the same day. Provided, the said commissioners shall not have power to change the boundaries of existing precincts, or to create any new precinct, or to change the voting place in any precinct, within thirty [30] days of any election, but all such elections shall be held at the

places, and within the boundaries, as the same existed thirty [30] days before the date of said election.

The action of said commissioners in changing the voting place in any precinct, or in altering the boundaries of any precinct, or in establishing any new one, shall be entered in the record to be kept by them, and a copy of said order shall set out intelligently and accurately the boundaries of said precincts as so altered or established, shall be filed with the Clerk of the County Court, who shall record the same at full length on the record book in which the minutes of the proceedings of the County Court are recorded. If the County Election Commissioners shall fail to fix a place in any precinct at which the election is to be held, it shall be the duty of the sheriff to fix temporarily a place of holding said election. Notice of any change made shall be given to the electors by posters put up in at least five [5] public places in such precinct. All voting places shall be fixed at well known points in the several precincts and easily accessible to all electors entitled to vote therein. [Act Mar. 4, 1891, No. 30, § 6, p. 32; C. & M. Dig., §§ 3735, 3795, 3796; Pope's Dig. §§ 4689, 4765, 4766.]

E. Section 3-1011: Canvass by county election commissioners—Certificates of election—Returns to secretary of state and speaker of house of representatives—Keeping of returns.—As soon as the returns from all the precincts are received, but in no event later than seventh day after the election, the County Election Commissioners shall, from the certificates and ballots received from the several precincts, proceed to ascertain and declare the result of said election, and shall within fifteen [15] days after the day of said election deliver a certificate of his election to any person having the highest number of legal votes for member of the House of Representatives, or any county or township officer; and the said commissioners shall also file in the office of the clerk of the county court a certificate setting forth in details the result of said election. The commissioners of election shall within two [2] days after the comparison and examination of the returns of any election, deposit in the nearest postoffice, on the most direct route to the seat of government, certified copies of the abstracts

of the returns of the election for members of Congress and all executive, legislative and judicial officers, directed to the Secretary of State, and they shall at the same time inclose in a separate envelope and direct to the Speaker of the House of Representatives, in care of the Secretary of State, at the seat of government, a certified copy of the abstract of votes given for Governor, Secretary of State, Auditor of State, Treasurer of State, and Attorney General. It is made the duty of the Secretary of State to safely keep the returns addressed to the Speaker of the House of Representatives until the same shall be required for the purpose of ascertaining and declaring the result of the election as prescribed in § 3, art. 6, of the Constitution. [Act Mar. 4, 1891, No. 30, § 14, p. 32; Mar. 14, 1895, No. 40, § 1, p. 43; C. & M. Dig. § 3836; Pope's Dig., § 4823.]

F. Section 3-1012: Recount.—At any time before the County Election Commissioners shall finally complete the canvass of the returns and make declaration of the result thereof, any candidate voted for who may be dissatisfied with the returns from any precinct may have a recount of the votes cast therein by presenting to the County Election Commissioners a petition showing reasonable grounds for believing that the return, as made by the judges of election, does not give a correct statement of the vote as actually cast, as the same is shown by the ballots returned with the certificate of the judges. Upon the prayer of such petition(s) being granted, the commissioners shall open the package containing the said ballots and proceed to recount the same in the manner prescribed by law for the count to be made by the judges in the first instance, and the result as found upon such recount, if the same differs from that certified by the judges, shall be included in the canvass as the vote for the particular precinct for which said recount was ordered and made. After the recount is completed, the ballots shall again be sealed and kept as herein provided. [Act Mar. 4, 1891, No. 30, § 15, p. 32; C. & M. Dig., § 3837; Pope's Dig., § 4824.]

## IV.

Arkansas Statutes controlling Primary Election Contests (Chapter 2, Title 3):

A. Section 3-245: Contests—Right, jurisdiction and procedure.—A right of action is hereby conferred on any candidate to contest the certification of nomination or the certificate of vote as made by the county central committee. The action shall be brought in the Circuit Court of the county in which the certification of nomination or certificate of vote is made when the office of Representative or a county or township office including the offices of county delegate and county committeeman is involved, and within any county in the Circuit or District wherein any of the wrongful acts occurred when any Circuit or District office is involved, and in the Pulaski Circuit Court when the office of the United States Senator and any State office is involved. If there are two [2] or more counties in the District where the action is brought and when fraud is alleged in the complaint, answer or cross complaint the Circuit Court may hear testimony in any county in the District. The complaint shall be verified by the affidavit of the contestant to the effect that he believes the statements thereof to be true, and shall be filed within 20 days of the certification complained of. The complaint shall be answered within 20 days. [Init. Measure of 1916, No. 1, § 12 (1st, 2nd, 3rd pars.), Acts 1917, p. 2287; C. & M. Dig., § 3772; Pope's Dig., § 4738; Acts 1947, No. 386, § 2, p. 884; 1949, No. 21, § 1, p. 74; 1961, No. 460, § 1, p. 1412.]

B. Section 3-246: Hearing of contest—Adjournment of other courts.—If the complaint is sufficiently definite to make a prima facie case, the judge shall, unless the circuit court in which it is filed is in session or is to convene within thirty [30] days, call a special term, which shall possess the powers of a court convened in regular term, and shall proceed at once to hear the case. If the case comes in regular term it shall be given precedence and be speedily determined. The judge may adjourn other courts in order to hear such cases, and may call another judge in exchange to sit in other courts, or vacate the bench in other courts and cause a special judge to be elected to hold the same;

and the session of the special term to hear such cases shall not interfere with the validity of other courts proceeding at the same time in said circuit. [Init. Measure of 1916, No. 1, § 12 (4th par.), Acts 1917, p. 2287; C. & M. Dig., § 3773; Pope's Dig., § 4741.]

C. Section 3-247: Appointment of special judge to hear additional contests.—In the event that there are more election contests brought under said section 3772 of Crawford and Moses' Digest [§ 3-245] than the Circuit Judge can dispose of prior to ten [10] days before any general or special election to be held, then either of the parties to said contest may so report the same to Circuit Judge in vacation or otherwise who shall have full and complete authority to appoint an attorney with the qualifications of Circuit Judges to hear any such contest and render a final judgment in the same; and the judgment so rendered by the attorney so appointed shall be binding with full force and effect as if the regular Circuit Judge had heard the cause; in the appointment of such attorney, the said Circuit Judge will not be confined in the selection of such attorney to the Circuit (Judicial) in which the said contest is pending; Provided, however, the hearing of said contest shall be had in the county in which the contest has been filed, and provided further that all proceedings shall be conducted as in the case of any regular judge trying any such case, including the right of appeal, and the said judge so appointed shall have full power and authority in the trial of election contests in all respects as are now conferred by the Constitution and State of Arkansas upon the Circuit Judges of this State. Said Circuit Judge shall appoint as such special Judge any attorney named by a committee of three [3] qualified electors of the county in which such contest is pending, one [1] to be named by the contestant, one [1] to be named by the contestee and the third to be named by those two [2]. In the event the first two [2] committeemen do not agree within five [5] days on a third member, then such third member shall be chosen by lot from the respective choices of said two [2] committeemen. [Acts 1935, No. 123, § 7, p. 339; Pope's Dig., § 4740.]

D. Section 3-248: Trial of contests—Procedure—Appeal—Advancement of hearing.—The cause shall be tried by the circuit judge in open court without a jury; an appeal may be taken from the judgment, provided, however, that the appeal shall not operate as a supersedeas, by judicial order or otherwise, and the judgment of the circuit court shall, until reversed, be obeyed by political committees and their officers and all election officers; further provided, it shall be the duty of the Supreme Court to advance the hearing of any such appeal. [Init. Measure of 1916, No. 1, § 12 (5th par.), Acts 1917, p. 2287; C. & M. Dig., § 3773; Pope's Dig., § 4741.]

E. Section 3-249: Enforcement of judgment—Mandamus—Penalty for violation.—The circuit court, or, when necessary, the circuit judge in vacation, shall, by mandamus to the officers of political parties and election officers, or both, or the Secretary of State, enforce the proper certification and proper ballot in accordance with the judgment of the court, and shall punish the failure of any such officers to obey the mandamus by imprisonment in the county jail. [Init. Measure of 1916, No. 1, § 12 (6th par.), Acts 1917, p. 2287; C. & M. Dig., § 3773; Pope's Dig., § 4741.]

F. Section 3-250: Party rules regarding contest superseded.—All laws or rules of political organizations holding primary elections providing for contest before political conventions or committees other than the proceedings herein provided shall be of no further force or effect. [Init. Measure of 1916, No. 1, § 17, Acts 1917, p. 2287; C. & M. Dig., § 3778; Pope's Dig., § 4746.]

G. Section 3-253: Determination after final election—Ouster from office.—Should a proceeding under section 12 [§§ 3-245, 3-246, 3-248], or a criminal prosecution under section 13 [§ 3-251] be not determined finally until after the election, and the defendant in such proceeding is elected to the office as the nominee of the party, and it is determined that he was not entitled to the nomination, or the judgment contains a finding that he violated the laws, as provided in section 14 [§ 3-252], then such judgment shall operate as an ouster from office, and the vacancy in it shall be filled as provided by law for filling vacancies in such

office in case of death or resignation. [Init. Measure of 1916, No. 1, § 15, Acts 1917, p. 2287; C. & M. Dig., § 3776; Pope's Dig., § 4744.]

V.

Arkansas Statutes setting forth general pleading requirements:

A. Section 27-1113: Complaint—Form and contents.—The first pleading by the plaintiff is the complaint. The complaint must contain:

First. The style of the court in which the action is brought.

Second. The style of the action, consisting of the names of all the parties thereto, distinguishing them as plaintiffs and defendants, followed by the words "complaint at law," if the proceedings are at law, and by the words "complaint in equity," if the proceedings are equitable.

Third. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action.

Fourth. A demand of the relief to which the plaintiff considers himself entitled. [Civil Code, § 109; C. & M. Dig., § 1187; Pope's Dig., § 1409.]

B. Section 27-1117: Amendment of complaint after demurrer.—If the court sustains the demurrer, the plaintiff may amend, with or without costs, as the court may order. [Civil Code, § 113; C. & M. Dig., § 1191; Pope's Dig., § 1413.]

C. Section 27-1150: Construction of pleadings.—In construing a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties. [Civil Code, § 139; C. & M. Dig., § 1224; Pope's Dig., § 1448.]

D. Section 27-1158: Amendment of complaint—Time.—The plaintiff may amend his complaint without leave at any time before an answer is filed, and without prejudice to the proceedings already had. [Civil Code, § 153; C. & M. Dig., § 1237; Pope's Dig., § 1461.]

E. Section 27-1160: Amendment of pleadings or proceedings by court—Enlargement of time for filing answer and reply—Pleadings made definite and certain—Errors or defects in proceedings disregarded.—The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. The court may likewise, in its discretion, allow an answer or reply to be made after the time limited by this Code, or by an order, enlarge such time. And whenever any proceeding taken by a party, fails to conform in any respect to the provisions of this Code, the court may permit an amendment of such proceeding, so as to make it conformable thereto. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the claim or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. The court, must, in every stage of an action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect. [Civil Code, § 155; C. & M. Dig., §§ 1239-1242; Pope's Dig., §§ 1463-1466.]

# APPENDIX B

## OPINIONS AND JUDGMENT BELOW SUPREME COURT OF ARKANSAS

No. 5-3593

Opinion Delivered May 17, 1965

KENNETH B. WHEELER, ..... *Appellant*

v.

PAUL JONES, ..... *Appellee.*

Appeal from Searcy Circuit Court; Woody Murray, Judge.

Affirmed.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J. This is a proceeding filed by the appellant to contest the general election of last November with respect to the office of county judge in Searcy county. This appeal is from an order sustaining a demurrer to the complaint, on the ground that it fails to state a cause of action, and dismissing the proceeding.

The complaint alleges that the County Board of Election Commissioners certified that the appellee, the Democratic candidate, had defeated the appellant, the Republican candidate, by a vote of 1,701 to 1,691. As a basis for the contest the complaint asserts that 52 named persons who were not qualified electors voted in the absentee box and that an additional 196 named persons voted in precincts in which they did not reside. There is no allegation either that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside. All that the complaint really asks is that the questioned ballots be declared void and that the remaining ballots then be counted to see who actually won the election.

We have often held that a complaint such as this one does not state a cause of action. Several of the cases were reviewed in *McClendon* v. *McKeown*, 230 Ark. 521, 323 S. W.

2d 542 (1959). Under these decisions the contestant, to state a cause of action, must show that the outcome of the election would be changed if certain identified illegal votes cast for his opponent were disregarded.

This appellant makes two arguments in his attempt to escape the effect of our prior holdings. First, it is contended that those cases involved the primary election laws and are not controlling in a contest of a general election. It is true that the statute permitting a contest of a primary election, Ark. Stat. Ann. § 3-245 (Repl. 1956), is not worded exactly like the statute that governs the contest of a general election. § 3-1204. There is, however, nothing in the difference in wording to support the appellant's present argument. Neither statute purports to define the allegations that a contestant must make to state a cause of action. The rule followed in our earlier opinions is not of statutory origin. It is merely an example of the basic principle that a complaint, to be good against demurrer, must state *facts* constituting a cause of action. It is the absence of such facts that makes the present complaint fatally deficient.

Secondly, it is insisted that this plaintiff would be denied due process of law if we should hold his complaint to be subject to demurrer. This argument has no merit. Fundamentally the appellant complains of the fact that some persons voted in precincts where they did not live and that others who were not qualified electors were allowed to vote. There is nothing in the due process clause to require either that a voter cast his ballot only in his home precinct or that he comply with the various Arkansas statutes defining a qualified elector. As far as the constitution is concerned, the legislature is free to dispense with both of these requirements. Thus it is readily apparent that the grievances now asserted by the plaintiff do not involve matters protected by the guaranty of due process of law.

The trial court was right in refusing to allow the plaintiff to amend his complaint after the expiration of the twenty days allowed for the filing of the contest. Ark. Stat. Ann. § 3-1203. As we have seen, this complaint did not state a cause of action. To allow it to be amended in such a way as to state a cause of action would, in effect,

permit the plaintiff to assert, for the first time, his cause of action after the expiration of the twenty days. Such an amendment is not permissible. *Cain* v. *McGregor,* 182 Ark. 633, 32 S. W. 2d 319 (1930). We do not think it necessary to discuss other subordinate contentions made by appellant.

Affirmed.

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1964 MAY 17, 1965

KENNETH B. WHEELER, ..... *Appellant*

v. Appeal from Searcy Circuit Court

PAUL JONES, ..... *Appellee.*

JUDGMENT

This cause came on to be heard upon the transcript of the record of the circuit court of Searcy County, and was argued by counsel; on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant all his costs in this Court, in this cause expended, and have execution thereof.

May 17, 1965.

## APPENDIX C

### Complaint and Demurrer

Complaint (filed November 21, 1964; Served November 21, 1964)

COMES the Plaintiff-Contestant and for his cause of action states:

1

The Plaintiff-Contestant and the Defendant-Contestee are both citizens and residents of Searcy County, Arkansas. The Plaintiff-Contestant was the Republican candidate for the office of County Judge of Searcy County in the General Election held November 3, 1964, and the Defendant-Contestee was the Democrat candidate for said office in said election. This is an election contest filed pursuant to the laws of the state of Arkansas, and more particularly Title 3, Chapter 12, Sections 3-1201 et seq., Ark. Stats. 1947 Ann.

2

After the November 3, 1964, General Election, the County Board of Election Commissioners for Searcy County and thereafter the County Clerk of Searcy County certified the vote in the race between Plaintiff-Contestant and Defendant-Contestee for County Judge to be 1701 for Contestee and 1691 for Contestant and further certified the Contestee Jones to be the duly elected County Judge. This action contests the said election, the vote therein and the certifications aforesaid.

3

Plaintiff-Contestant challenges and objects to the voters voting in the absentee box and in the various precincts as set forth in Exhibit A which is attached hereto and made a part hereof as if set out word for word herein for the reasons stated in said exhibit and upon such additional grounds as are stated herein. Plaintiff-Contestant objects to the qualifications of all of said voters whose names are set forth in Exhibit A, for failure to satisfy resi-

dence requirements, age requirements, competency requirements, or poll tax requirements of the laws of the State of Arkansas.

4

On information and belief Plaintiff-Contestant asserts that a number of ballots of persons attempting to vote were not counted for reasons unknown to the Plaintiff-Contestant. All of such ballots and the qualifications of the persons voting same are contested hereby. Same should be examined by the court and a determination made if said ballots should have been counted or if said person should have been permitted to vote.

5

Unauthorized persons were permitted to be present in the voting precincts during the voting and during the counting of the votes. In the precinct known as St. Joe, one of such unauthorized persons placed a hand in the ballot box during said count. The box in said precinct appeared to be locked when it was removed from said precinct but was unlocked when it arrived at the county courthouse. The ballot boxes used in this election did not meet the requirements of the laws of the State of Arkansas. Certain of the judges and clerks in the election were not qualified under the laws and the constitution of the State of Arkansas. There appears to be an instance (or instances) of double voting. Many of the voters were wrongfully permitted to vote in a precinct other than the one in which they resided, contrary to law. Some persons voting in said election did not have poll taxes according to the official poll book.

For these and other reasons Plaintiff-Contestant challenges all the boxes in the county and asks that a re-count thereof be made after the particular challenges to the particular voters listed in Exhibit A have been determined.

Wherefore Plaintiff-Contestant contests on a county-wide basis the results of the County Judge election held on November 3, 1964, and prays that all illegal and improper votes be purged, that the legal and valid votes be re-counted; that the improper certification of the County Election Commission and the County Clerk be revoked; that he

have a judgment of ouster against the Defendant-Contestee; for damages in accordance with law; for a revocation of any commission issued to Defendant-Contestee; for an order declaring Plaintiff-Contestant duly and lawfully elected to the office of County Judge of Searcy County with directions that a copy of said order be forthwith transmitted to the Governor for further action in accordance with law; for his costs and all other proper relief.

/s/ Kenneth B. Wheeler
Kenneth B. Wheeler,
Plaintiff-Contestant

/s/ G. Thomas Eisele
G. Thomas Eisele,
Attorney for Plaintiff-Contestant

VERIFICATION

STATE OF ARKANSAS
COUNTY OF PULASKI

I, KENNETH B. WHEELER, having first been duly sworn state upon my oath that the facts set forth in the within and foregoing complaint are true and correct to the best of my information and belief.

Dated this 20th day of November, 1964.

/s/ Kenneth B. Wheeler

EXHIBIT "A"

List of voters challenged in absentee box: (Here followed 63 voters' names and their Absentee Voter Numbers.)

The above absentee voters are challenged on the grounds that:

1. They are not qualified voters;

2. Generally, that they did not vote in accordance with the requirements of the absentee voting laws of the State

of Arkansas, and more particularly that the applications, voters' statements and ballots were not handled, delivered, and returned in accordance with said laws; and,

3. That the applications for absentee ballots are void and invalid because not filled out, signed, executed or witnessed in accordance with the requirements of the law.

In addition, the entire absentee ballot box is challenged upon the grounds:

1. That the wife of the Defendant-Contestee served as a judge on the absentee box;

2. That the absentee box was not handled in the manner required by law, and more particularly that the ballots were removed from the ballot box, arranged alphabetically and then counted, contrary to law.

The following voters are challenged for failure to meet the qualifications of law as particularly set forth in Paragraph 3 of the complaint and for the additional reason that they were not residents of the precinct in which they voted. The following voters are challenged in the precincts indicated: (Here follows a list of the precincts and 120 voters' names with their voter numbers.)

DEMURRER (Filed November 30, 1964.)

Comes the Contestee, Paul Jones, and demurs to Contestant's complaint and for cause therefore states:

That said complaint does not state a cause of action under the law.

WHEREFORE, Contestee prays that his demurrer be sustained and that said complaint be dismissed at the cost of the Contestant and for all proper relief.

John B. Drive & N. J. Henley
Attorneys for Contestee
By /s/ N. J. Henley

## APPENDIX D

MOTION FOR REHEARING

G. THOMAS EISELE
Attorney for Appellant

Comes the Appellant pursuant to Rule 20 of the Rules of the Supreme Court of Arkansas and pursuant to the order of May 17, 1965, entitled *In Re: Petitions for Re-Hearing* and moves the Court to rehear this appeal and change its opinion entered herein on May 17, 1965, and for his grounds, states:

I.

Never, before the decision in this case, had this Court held that, to state a cause of action under Section 3-1204, a complaint must include allegations:

(a) that the "challenged votes were cast for 'the'' contestee-appellee, or

(b) that "the result of the election would be changed if these votes were set aside." (page 1 of opinion)

Likewise, never had such omissions been the sole, or principal, basis for sustaining a demurrer under the primary election contest statute, § 3-245. It is true that such factors were mentioned in certain of the latter cases but only as dicta, or makeweight, and clearly not as the controlling basis for any such decision.

This Court cites only *McClendon* v. *McKeown,* 230 Ark. 521, 323 S. W. 2d 542 (1959), and the cases reviewed therein, in support of its assertion that, "We have often held that a complaint such as this one does not state a cause of action." (Page 2 of opinion.) We attempted to analyze the *McClendon* opinion starting at the bottom of Page 11 of our *Reply* brief (which, with the Court's permission, was not printed but reproduced by the "ditto" process). There the complaint, according to the Circuit Court's opinion (which was adopted by this Court), failed to contain an allegation "showing the number of votes received by each candidate." The contestant's offer, then, to challenge 23 unnamed and

unidentified votes was meaningless. There was no way, by examining the complaint, to tell if a successful challenge of 23 votes—or any other number of votes—would, or could, change the result of the election. Not so here where Mr. Wheeler's complaint showed the number of votes returned for Mr. Jones and the number returned for him. Furthermore, a fair reading of *McClendon* makes it absolutely clear that the determining factor there was contestant's failure to give the names of the persons "alleged to have cast an illegal ballot." This Court said:

> "His continued *failure to name the persons casting the alleged illegal ballots* justified the Circuit Court in sustaining the demurrer . . ." (Emphasis added.)

As stated earlier in the *McClendon* opinion:

> "In *Ferguson* v. *Montgomery* (supra), and in *Crawford* v. *Harmon* (supra), we pointed out that *when challenged ballots were to be discarded*—as distinguished from fraud involving the entire box—*it was essential that the names of the challenged voters should be given.* In sustaining a demurrer to a paragraph in a complaint we said, in *Crawford* v. *Harmon* (supra) [149 Ark. 323, 232 S. W. 428]: 'The paragraph contained no allegations *with respect to the names* of any of the persons who are alleged to have cast the unsigned ballots'." (Emphasis added.)

The complaint in *McClendon* truly suggested a "fishing expedition." But here each illegal ballot is identified by voter name, voter number, and the bases of illegality. No fishing expedition. To the contrary: precise and clear information and notice to contestee of exactly what contestant's proof would be. So, clearly, *McClendon* in its fundamental holding, does not support the Court in its opinion here.

The other cases "reviewed in" *McClendon* are more favorable to appellant. Indeed, the *McClendon* opinion starts out with a review of *Gunter* v. *Fletcher* in which the pleading requirements are set forth:

> "(1) given the name of each person alleged to have cast an illegal ballot and the township in which

> each had voted; (2) stated the name of each person whom it was alleged had voted without poll tax; and (3) listed the name of each of the other voters casting ballots claimed to be illegal. There were several hundred so claimed; . . . Thus, it will be seen that in *Gunter* v. *Fletcher* the contestant gave detailed information of the name and voting place of each person alleged to have cast an illegal ballot." (See Appellant's *Reply Brief*, page 14.)

Here Mr. Wheeler's complaint set forth (1) "the name of each person alleged to have cast an illegal ballot and the township in which each voted"; (2) "stated the name of each person whom it was alleged had voted without poll tax"; and (3) "listed the name of each of the other voters casting ballots claimed to be illegal." Indeed, Mr. Wheeler's complaint also gave the number of votes returned and certified for each candidate and much additional factual information which the *Gunter* complaint omitted.

This Court states on page 2 of its opinion that "The rule followed in our earlier opinions is not of statutory origin." Appellant had argued strongly to the contrary. See pages 4-6 of Appellant's *Reply Brief*. Not only had this Court in *Robinson* v. *Knowlton*, 183 Ark. 1127, 40 S. W. 2d 450 (1931) stated clearly that:

> ". . . such contest is generally held not to be a civil action subject to the rules of pleading in actions at law but to be *special statutory proceedings*, varying in its nature as well as *in the sufficiency of the pleadings* according to the statutes . . ." (Emphasis added),

but practically every case decided under the primary contest statute actually used the language of § 3-246, thereby illustrating its influence on the Court's decision. Furthermore, candor alone should make one and all concede that there are no requirements under "the basic principle" of complaints or pleadings which would make a plaintiff allege *that which he cannot know*. (A discussion of the rules applicable to civil cases generally will be found at pages 32-34 of Appellant's original brief.) It is equally clear that such requirements as this Court has established in the pri-

mary election contest cases are not also such as are generally required in ordinary civil proceedings.

This Court states:

> "The rule followed in our earlier opinions is not of statutory origin. It is merely an example of the basic principle that a complaint, to be good against demurrer, must state facts constituting a cause of action. It is the absence of such facts that makes the present complaint fatally deficient."

This language must be tied back to that setting forth the fatal omissions:

> "There is no allegation either that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside."

Every effort has been made, short of oral argument, to make it clear that the fatal omissions, just referred to, are *NOT omissions of allegations of FACT* but, rather, of "belief", "opinion", "guess" or "hope". See Appellant's original brief pp. 35-38; 45-47. There is no legal way for a contestant to determine, before hearing, that the "challenged votes were cast for appellee." This being so it is equally true that there is no legal way contestant can ascertain that "the result of the election would be changed if these votes were set aside." So when the Court states on page 2 of its opinion, that:

> ". . . contestant . . . must *show* that the outcome of the election would be changed if certain identified illegal votes *cast for his opponent* were disregarded." (Emphasis added),

It should be understood that this Court is placing an *impossible condition* upon Contestant's right of contest: Contestant has no way to "show" that the outcome of the election will be changed; likewise, he has no way of knowing that any of the illegal ballots were "cast for his opponent."

II.

The Court in its opinion makes no reference to Appellant's Argument I (B) (2) wherein it is contended that, if it be held by the Court that a contestant must allege his "belief" that the illegal votes were cast for his opponent or that he "would win the contest," then, still, the allegations of the complaint "substantially comply" with such requirements. See Appellant's brief, pp. 35, 37-38.

III.

With respect to the Constitutional questions this Court states on page 3 of its opinion:

> "Fundamentally the appellant complains of the fact that some persons voted in precincts where they did not live and that others who were not qualified electors were allowed to vote. There is nothing in the due process clause to require either that a voter cast his ballot only in his home precinct or that he comply with the various Arkansas statutes defining a qualified elector. As far as the constitution is concerned, the legislature is free to dispense with both of these requirements. Thus it is readily apparent that the grievances now asserted by the plaintiff do not involve matters protected by the guaranty of due process of law."

From this language it becomes readily apparent that the Court has misapprehended the nature of the Constitutional issues raised both here and in the Court below. Substantive due process with respect to the laws governing voting requirements, and residence requirements, and voter qualifications is *not* at issue. The essence of this issue will be found in the requirements of procedural due process. See points I (B) (3), (4); I (C) (2), (3); and III of Appellant's original brief. As stated at pages 41, 42 of Appellant's original brief:

> "The 14th Amendment of the Constitution of the United States of America, and through it, parts of the Bill of Rights, the 9th Amendment of the United States Constitution and Sections 3, 4, 8, 12, 13, 18, 24 or 29 (of the Arkansas Constitution) could possibly be

brought into issue depending upon the precise position which the court might take upon the issues here before it. Principally, however, the due process clauses of the Federal Constitution—the 14th Amendment to the United States Constitution and Art. 2, Section 8 of the Arkansas Constitution—and Section 13 of Art. 2 of the Arkansas Constitution appear to be involved here. The latter states:

> 'Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely and without denial, promptly and without delay, conformably to the laws.'

Broadly stated, the point is that remedies should be available, and that citizens should have a reasonable and fair method of exercising these remedies. *Statutes or judicial decisions which unduly and unfairly restrict the right to obtain a hearing upon the merits before a competent tribunal would violate the constitutional provisions just referred to.* The effect of such restrictions is to deny to the citizen a 'hearing'—the fundamental element of due process." (Emphasis added.)

The cases of *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 and *Societe Internationale* v. *Rogers,* 357 U. S. 197, among others, were cited and quoted. The point is that Appellant has a constitutional right to a hearing at which he can introduce evidence of the illegal and void votes in order to determine and show that he won the election.

Now that the Court's opinion has been handed down, another procedural due process argument arises: There was *no notice* of the pleading requirements, here established for the first time, and retroactively applied, by which a contestant could, upon examination of the general election contest statute, the cases decided thereunder, or upon examination of general civil rules with respect to sufficiency of pleadings, have known that, in addition to the allegations required to raise all factual and legal issues, he must also allege (1) his belief or opinion that the illegal votes were

cast for his opponent or (2) his belief or opinion that "he would win" the contest.

As a result of the Court's opinion here, still another United States Constitutional issue is raised: Here the Court has stated that:

> "The rule followed in our earlier opinions is not of statutory origin. It is merely an example of the basic principle that a complaint, to be good against demurrer, must state *facts* constituting a cause of action. It is the absence of such facts that makes the present complaint fatally deficient.

Pleading requirements in Arkansas arise out of our statutes. Section 27-1113, Ark. Stats. states, inter alia, that a complaint must contain:

> "Third. A statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action."

So we wonder if the Court really means to declare that the test is "not of statutory origin." True, what constitutes a cause of action in a particular proceeding—the basic elements thereof—is not usually established by statute, but the manner in which these elements are stated in the complaint is controlled by the statutory test. If this Court, upon reconsideration, should make its ruling more explicit by holding that Section 27-1113 requires Mr. Wheeler here to allege his beliefs and opinions, as set forth above, then Section 27-1113 would be unconstitutional under the due process clause of the 14th Amendment as applied. So if the Court would say, "yes, the test is that found in § 27-1113 under which Mr. Wheeler should have alleged 'facts constituting' his cause of action" and, further, that he failed to do so by not alleging "that these challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside" (See page 1 of opinion), then the issue of the Constitutional application of Section 27-1113 would be squarely presented.

The effect of the Court's decision here is to require contestant to allege, *and verify,* factual information which

he cannot know unless he violates the law. If he knows how the illegal votes have been cast, he has violated the law. If he does not know, he should not be required to make a frivolous allegation of his belief in that respect. The opinion here effectively closes the courthouse door to honest contestants and to those who have no access to the ballots. The Fourteenth Amendment to the Constitution of the United States does not permit the establishment of procedural requirements which will have this effect.

IV.

The Court's summary disposition of Appellant's argument with respect to his right to amend also suggests that the Court was not considering the Federal Constitutional implications of its decision. When one couples the statutory scheme for the conduct of a general election contest with the ruling here on the "right to amend" it becomes clear that the Court has done away with the so-called "right to amend." The twenty day statute of limitation found in § 3-1203, which the Court has ruled applicable to this contest, should be read in the light of the fact that contestee has twenty days within which to file a responsive pleading. Therefore, even if the contestant files his contest on the day after the general election, by the time the contestee files his demurrer 20 days later, the so-called right-to-amend date would also have expired under the Court's decision. By using the magic words "this complaint did not state a cause of action," the denial of the right to amend would appear to naturally follow. This Court states:

> "As we have seen, this complaint did not state a cause of action. To allow it to be amended in such a way as to state a cause of action would, in effect, permit the plaintiff to assert, for the first time, his cause of action after the expiration of the twenty days. Such an amendment is not permissible."

We bring the Court's attention back to the test of the sufficiency of a complaint challenged by a demurrer. First § 27-1150 provides:

> "In construing a pleading for the purpose of determining its effects, its allegations shall be liberally

construed, with a view to substantial justice between the parties."

Next, the Court might well ask itself, *if* contestant Wheeler had alleged that the "challenged votes were cast for the appellee or that the result of the election would be changed if these votes were set aside," would such allegations be taken as true for the purpose of the demurrer? The answer is clearly that such opinions and conclusions would *not* be accepted as true and, therefore, if the *factual* allegations of the complaint had failed to state a cause of action, these "opinion" allegations would add nothing. See, for instance, *Seubold* v. *Fort Smith Special School District,* 218 Ark. 560, 237 S. W. 2d 884, 886, Appellant's original brief, page 38. This analysis reveals, it is submitted, the fallacy of the circular reasoning which really *starts with the conclusion* that the suggested allegations are essential to contestant's "cause of action." Analyzed correctly it would seem clear beyond doubt that such allegations have nothing to do with contestant's cause of action. His cause of action arises out of the *fact* that over 200 illegal and void votes were counted in a situation where he lost by only 10 votes. His "beliefs" have nothing to do with it!

Section 3-1204 provides that the contestant "may amend the same in such manner and upon such terms as do not prejudice his opponent." If a contestant is to be denied the right to insert such formal, non-factual allegations such as his "hope" or "belief" that he would win, then it is difficult to conceive of any amendment of a complaint which could be permitted under § 3-1204.

The Court in the last paragraph of his opinion has not made it clear whether its decision upon the "right to amend" arises out of its interpretation of § 3-1204 or § 27-1117, or § 27-1158 or § 27-1160, or, on the other hand, that such a requirement "is not of statutory origin." Regardless, however, whether the rule is judicial and non-statutory in origin or whether it arises out of an interpretation of such statutes, the denial of such right to amend is unconstitutional under the due process clause of the Constitution of the United States of America and particularly the 14th Amendment to said Constitution.

Appellant would request that the Court reconsider its ruling with respect to the right to amend. If it chooses not to change same, then, appellant requests that it clarify the holding stated in the last paragraph of its opinion by indicating whether the denial of the right to amend is based upon an interpretation of a statute or is non-statutory in origin.

## CONCLUSION

This case involves issues of vital public interest relating as it does to the heart of the democratic process—general elections. It should be decided in the context of all pertinent Arkansas law. In this respect the Court will notice that the entire general election machinery is controlled by the political party of the administration in power. All of the so-called "rights" of a losing party before county election commissions, such as the right to a re-count, tend to become meaningless if the complaining candidate is a member of the minority party. The denial of such relief by the commission, controlled by the majority party, gives no immediate right to judicial review or relief. Rather, such minority party candidate is relegated solely to an "election contest." Therefore, to deny him a hearing has a much more dire effect than would be the case in a primary election since, practically speaking, the minority party candidate has no other avenues of relief available to him.

It is prayed that the Court reconsider its opinion herein; that it reverse the lower Court's order sustaining the demurrer and that the case be remanded for further proceedings.

Respectfully submitted,

G. THOMAS EISELE

*Attorney for Appellant*

### CERTIFICATE OF COUNSEL

I, G. Thomas Eisele, counsel for Appellant, Kenneth Wheeler, hereby certify that there is merit in the above petition and that same is not filed for the purpose of delay but only that justice may be done.

G. Thomas Eisele